Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	))	WC Docket No. 02-112
	)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules	)))	CC Docket No. 00-175

COMMENTS OF AMERICATEL CORPORATION

Judith L. Harris
Robert H. Jackson
Reed Smith LLP
1301 K Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
202.414.9200
202.414.9299 (fax)
Counsel for Americatel Corporation

Dated: June 30, 2003

Table of Contents

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	))	WC Docket No. 02-112
	)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules	)))	CC Docket No. 00-175

COMMENTS OF AMERICATEL CORPORATION

Americatel Corporation ("Americatel"),[1] through counsel, respectfully submits its comments in the above-captioned proceeding.

I. Summary and Introduction

On May 19, 2003, the Federal Communications Commission ("Commission" or "FCC") released its *Further Notice* in the above-captioned proceeding.[2] In light of the many changes in the marketplace since the FCC last visited its rules governing the provision of long distance services by the Bell Operating Companies ("BOCs") and incumbent independent local exchange carriers' ("ILECs"), the Commission seeks "comment on the appropriate classification

---

[1] Americatel, a Delaware corporation that is a subsidiary of ENTEL Chile, is a common carrier providing domestic and international telecommunications services. Americatel also operates as an Internet Service Provider ("ISP"). Americatel specializes in serving Hispanic communities throughout the United States, offering presubscribed (1+), dial-around, and prepaid long distance services, as well as private line and other high-speed services to its business customers. The majority of traffic carried by Americatel is dial-around in nature.

[2] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements* and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules,* Further Notice of Proposed Rulemaking, WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111 (rel. May 19, 2003) ("*Further Notice*").

of [the BOCs and ILECs'] provision of in-region, interstate and international interexchange telecommunications services." At the present time, the BOCs are required by Section 272 of the Communications Act of 1934, as amended ("Act"),[3] to provide interLATA services only through a separate affiliate for the first three years after a BOC receives permission from the FCC to provide those services. The FCC can extend that requirement by rule or order.[4] However, once a BOCs' obligation to provide interLATA services via a separate affiliate is ended, the BOC must provide those services as a dominant carrier subject to the FCC's tariff filing and cost support requirements.[5]

The FCC also seeks comments on whether it should continue to require ILECs to provide in-region interexchange services through a separate affiliate.[6] Finally, the Commission seeks comments on alternatives to dominant carrier regulation for the BOCs and whether ILECs should be treated differently than the BOCs.[7]

Americatel submits that the Commission should not weaken any existing regulatory restrictions for the BOCs until the FCC undertakes or authorizes detailed studies of the telecommunications market. It would be folly for the FCC to ease restrictions on the BOCs

---

[3] 47 U.S.C. §272.

[4] *Id*., at §372(f)(2). The FCC is, at the instant time, considering AT&T's request that the Commission extend SBC Communications' ("SBC") separate affiliate and other Section 272 obligations in Texas beyond the three-year period because of SBC's "enduring market power." *Petition of AT&T Corp. in WC Docket No. 02-112*, filed April 10, 2003. Both the Texas Attorney General's Office (Reply Comments of the Office of the Attorney General of Texas, filed May 19, 2003) and the Texas Public Utility Commission (Letter from Rebecca Klein*, et al*., Texas Public Utilities Commission, to Marlene Dortch, FCC, dated May 22, 2003) support AT&T's general position that the separate affiliate restrictions should remain imposed on SBC.

[5] *Further Notice*, at ¶2.

[6] *Id.*, at ¶3.

[7] *Id.*

unless and until further detailed market studies are made and placed in the record for public comments. Given the BOCs' continuous history of fighting against fair competition, the FCC may well determine that, based on a more complete record, more regulation, rather than less regulation of the BOCs is necessary. For example, it may be appropriate for the FCC to require that a BOC's separate affiliate be treated as a dominant carrier for in-region, interstate, interexchange services and that the BOCs be required to provide billing and collection services for their competitors on the same terms and conditions that the BOCs bill for their affiliates' long distance services.

Americatel also submits, that because of the lack of effective competition in the local exchange market and the BOCs' history of anti-competitive behavior, and their motivation to persist in such behavior, the FCC must continue to regulate the BOCs as dominant carriers in the event that the Commission permits the BOCs to provide long distance services on an integrated basis. Moreover, because of certain weaknesses in price cap regulation, the FCC must also require the BOCs to retarget all of their rates to cost and must impose additional regulatory requirements on the BOCs before permitting them to offer long distance services on an integrated basis.

Alternatively, the Commission could simply permit the BOCs to continue to offer long distance services through a separate affiliate, provided that such affiliate has an appropriate level of independent ownership. The introduction of independent ownership to a BOC's affiliate would create a fiduciary relationship from the BOC to the non-BOC shareowners that, in turn, would likely prevent the BOC from manipulating the affiliate in a manner that would protect the BOC's local market share or enable it to compete unfairly in the long distance market. With this type of ownership structure for its affiliate, the BOC would be required to manage its long distance affiliate in a manner that would optimize the financial results for the affiliate and its minority shareowners. Such a duty would likely go far to prevent anti-competitive behavior on the part of the BOCs.

II. The Market

A. Domestic

The domestic telecommunications market has been changing rapidly, and those changes have blurred many commonly accepted assumptions about scope and nature of that market. Hence, the Commission's desire to revisit its market definition at this time is appropriate. The FCC notes that it "previously defined the relevant service market for purposes of determining whether non-dominant regulation is appropriate as [*sic*] in-region, interstate interexchange telecommunications."[8]

That definition may no longer be accurate since more and more carriers, both wireline and wireless, are widely offering flat-rate packages of both local and domestic long distance calls for a single price. For example, in Americatel's largest market, BellSouth Telecommunications, Inc. ("BellSouth") offers its Miami residential customers unlimited domestic long distance calling for $24.99 per month,[9] but only if they also subscribe to BellSouth's Complete Choice® local calling plan.[10] However, BellSouth's Miami customers who subscribe to "variable call forwarding, preferred call forwarding or remote access to call

---

8 *Further Notice*, at ¶10.

9 http://www.bellsouth.com/apps/ipc/ICReqDispatcher?userEvent=getOfferDetailEvent&offerGroupLD=342&segment Id=2 (visited June 24, 2003).

10 BellSouth's $30 per month Complete Choice® local calling plan offers customers a home phone line, unlimited local calling, a choice of easy to use features and savings on select BellSouth products and services. http://www.bellsouth.com/apps/ipc/ICReqDispatcher?UserEvent=getOfferDetailEvent&catId=4&offerGroupId=80 (visited May 27, 2003).

forwarding features on the local line" are not permitted to purchase BellSouth's unlimited domestic long distance calling package.[11] This latter restriction seems to designed to protect BellSouth's revenues by preventing multiple customers from sharing the flat-rate toll service.

BellSouth is not alone in its bundling of local and long distance services. Verizon offers its Tampa residential customers, for example, a "Verizon Freedom" package for $49.95 per month that includes a local phone line, unlimited direct-dialed long distance calling "anytime, anywhere in the U.S. and to Canada," unlimited direct-dialed local and toll calling, and unlimited use of Voice Mail, Caller ID, Call Waiting, Speed Dialing 8 and Three-Way Calling.[12] Other similar bundled packages are available from Verizon and from other wireline carriers throughout much of the United States.

Changes in service offerings are not unique to local exchange carriers ("LECs"). As the Commission notes, many wireless carriers also offer "wide-area pricing plans," which has resulted in the "increased substitution of mobile wireless service for traditional wireline service, especially for interstate interexchange calls."[13] Many residential customers now make all or most of their personal long distance calls from cell phones because their wireless carriers no longer charge separately for those calls. The FCC's 2002 report on wireless market conditions noted that wireless plans "are substituting for traditional wireline long distance as well."[14] The

---

11 http://www.bellsouth.com/consumer/longdistance_promo.html?res_dd=ld# (visited May 27, 2003).

12 http://www22.verizon.com/foryourhome/sas/FreedomLongDesc.asp?ID=FLD&State=FL (visited May 27, 2003).

13 *Further Notice*, at ¶11.

14 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1999* and *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Seventh Report, 17 FCC Rcd 12985, at ¶32 (2002).

same report cited a trade press article in which an analyst claimed that "20 percent of AT&T's customers, or 5 million people, have replaced some wireline long distance usage with wireless [calls]."[15] More significant, the analyst's study is now well more than one year old and does not recognize the continued growth in the number of domestic long distance calls made by wireless callers.

These changes in the residential market have likely rendered the FCC's existing market definition – in-region, interstate interexchange services – invalid. The market may well be evolving to one that ignores geographic boundaries and regulatory classifications because more and more customers can, for a single fee, make non-local calls to any domestic destination.[16] This service pricing change on the part of wireline carriers, both traditional LECs and traditional long distance carriers, is probably the result of the availability of wide, toll-free calling areas from wireless carriers and the entry of the BOCs into interLATA services. Accordingly, because of these changes, the FCC's rules based on that definition are likely suspect as well.

However, the Commission should not simply redefine the service market[17] based only on the comments and reply comments that will be filed in response to the *Further Notice*.

---

15 *Id.* (citing *Carriers Said to Need New Tactics to Combat LD Substitution*, COMMUNICATIONS DAILY, Mar. 15, 2002).

16 On the other hand, not every local service customer makes a sufficient number of long distance calls to warrant paying for a bundle of long distance minutes. Many people continue to make few, if any, long distance calls in any given month. For those customers, the product market is still the interstate, interexchange market. Those "low-volume" customers' needs cannot be fairly ignored by the FCC or they could be adversely affected. This phenomenon complicates the FCC's task at hand and, as suggested by Americatel herein, constitutes further reason for the FCC to study this matter more deeply before loosening the rules under which the BOCs can market long distance services.

17 The same concerns expressed herein about the Commission's redefining the service market are equally

Continued on following page

Too much is at stake (such as the potential extinction of *a la carte* competition) for such a truncated process to be used. Americatel submits that the Commission should not take any regulatory action that could potentially result in re-monopolization of the long distance market by the BOCs and other large LECs[18] until the Commission has determined the appropriate definition of the market based upon a much more detailed record than can be developed pursuant to the *Further Notice*. While the Commission has already requested that parties "submit any empirical studies that have analyzed the substitution across these platforms or have estimated the cross-elasticity of demand across these platforms for in-region, interstate interexchange telecommunications services,"[19] it would be unreasonable to expect that such studies could be reviewed, analyzed and then discussed in reply comments that must be filed only 30 days after the initial comments containing those studies are filed with the Commission. Such an approach would be blatantly unfair to commenting parties. A much better approach for the FCC to take would be to expand this proceeding.

Continued from previous page

apropos to its proposed redefining of the geographic market—now defined as a national market (*Further Notice*, at ¶¶17-18). The short comment and reply cycle will not likely result in the detailed analysis necessary for the FCC to redefine the geographic market. The FCC should, therefore, include the geographic market in new economic studies to be commissioned.

[18] Americatel suggests that the Commission may want to consider exempting rural LECs, as defined in Section 3(37) of the Act, 47 U.S.C. §153(37), from any requirement to provide long distance services through a separate subsidiary or any new reporting or marketing restrictions adopted herein. Most rural LECs are very small companies that do not have the resources necessary both to provide quality service to their customers and to comply with detailed regulations. Their limited resources would be better spent on the former activity, rather than on the latter. Moreover, because rural LECs generally serve so few customers, they cannot realistically affect the long distance market. On the other hand, the Commission should continue to impose its regulations on other, bigger non-BOC LECs (*e.g.,* Sprint Local, Alltel, Citizens) that are sufficiently large that any anti-competitive conduct on their part could affect national or regional long distance markets. Sprint Local, for example, serves much of southwestern Florida, where many of Americatel's customers reside.

Americatel notes that the Commission, when faced with a biennial review of its broadcast ownership rules, established an internal "Media Ownership Working Group (MOWG) to study the media marketplace and improve the FCC's knowledge base and ability to make informed media policy decisions."[20] The MOWG commissioned twelve studies – some by FCC staff and others by outside researchers – in order "to inform the Commission's comprehensive review of its broadcast ownership policies."[21] The telecommunications market is just as crucial to the nation as the broadcast market, so the FCC should undertake a comparable effort to study the telecommunications market before it grants the BOCs the regulatory license to reinstate their former end-to-end monopolies.

Additionally, these additional studies and the public's comments thereon may well create a record that would lead the FCC to impose additional restrictions on the BOCs, rather than to remove existing regulations. For example, it may be appropriate for the FCC to require that a BOC's separate affiliate be treated as a dominant carrier for in-region, interstate, interexchange services and that the BOCs be required to provide billing and collection services for their competitors on the same terms and conditions that the BOCs bill for their affiliates' long distance services.

Continued from previous page

19 *Further Notice*, at ¶11.

20 *FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules,* Public Notice, DA 02-2476 (rel. October 1. 2002).

21 *Id.*

B. International

The market for international toll calls is different from the domestic long distance market for various reasons. One such reason is that the regulatory policies of the non-U.S. link of an international call can have a great effect on the market. For example, earlier this year, the traffic flow between the United States and the Philippines was affected when the FCC released an order that directed all U.S. carriers with facility-based authorizations to cease all payments for termination services to certain Philippine carriers pending restoration of AT&T and WorldCom circuits that had been previously disconnected over a settlement payment dispute and alleged "whipsawing" by some Philippines carriers.[22] While the Philippines dispute is somewhat extreme in both its occurrence and impact on the market, nevertheless, the presence of another sovereign nation on one end of each international toll call helps differentiate the international and domestic long distance markets.

The other distinguishing feature of the international market is its pricing. While many carriers offer flat-rate domestic long distance calling in one format or another, few, if any, carriers offer such pricing to multiple countries in the international market. The costs of terminating international calls are much more variable than the costs of terminating domestic long distance calls, both by route and over time, such that it would be too risky financially for

---

22 *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief* and *Petition of WorldCom, Inc. for Prevention of "Whipsawing" on the U.S.-Philippines Route*, Order, IB Docket No. 03-38, DA 03-518 (rel. March 10, 2003). This matter was later resolved satisfactorily and, as a result thereof, the Commission cancelled its directive for carriers to cease making payments to Philippine carriers. *See AT&T Circuits to the Philippines Reactived by Digital Telecommunications Philippines, Inc. and Bayan Telecommunications Company: Suspension Lifted on U.S. Carrier Payments to These Carriers*, Public Notice, IB Docket No. 03-38, DA 03-1030 (rel. March 31, 2003).

carriers to flat-rate international calls on an across-the-board basis or to include them in domestic calling packages.[23]

However, despite these differences in the domestic and international long distance markets, competition in both markets is affected by the existing power of the BOCs in their own local markets. An example of this market power can again be seen in Florida, where BellSouth, through its affiliate, BellSouth Long Distance, Inc. ("BSLD"), has recently been permitted to enter the interLATA market for both domestic and international services.[24]

As of June 24, 2003, BSLD's international plans included: the Fixed Rate Global plan, which provides discounted international calls for a $1.00 monthly fee;[25] the International Savings 20 plan, which offers a five percent discount from the Fixed Rate Global plan when a customer agrees to a monthly minimum charge of $20;[26] and the International Savings 40 plan,

---

23 There have been some limited forms of bundling international calls on a country- or region-specific basis. For example, SBC Communications offers its Texas customers 180 minutes of calls to Mexico for $20 per month for all zones ($0.09 per minute) (Mexico 180® calling plan). http://www01.sbc.com/Products_Services/Residential/ProdInfo_1/1,,395--6-3-19,00.html (visited June 24, 2003).

24 BellSouth was given permission to provide interLATA services to its Florida local service customers in December, 2002. *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc, for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee,* Memorandum Opinion & Order, WC Docket No. 02-307, FCC 02-331 (rel. December 19, 2002) *("Florida 271 Order").* BellSouth's provision of interLATA services in Florida must comply with the safeguards set forth in Section 272 of the Act, 47 U.S.C. §272, and Part 53 of the Commission's rules, 47 C.F.R., Part 53. Under Section 272, a BOC must provide any in-region long distance services through a separate affiliate that must operate independently from the BOC with separate officers, directors and employees; must maintain separate books, records and accounts; and must conduct all transactions with the BOC on an "arm's length basis."

25 http://www.bellsouth.com/consumer/longdistance_promo.html# Click on "international plans."(visited June 24, 2003). The $1.00 monthly fee applies when a customer also subscribes to a BellSouth domestic long distance plan. Otherwise, the monthly fee is $3.00.

26 http://www.bellsouth.com/http://www.douglasbruce.com/ Click on "international plans." (visited June 24, 2003).

which offers a 7.5% discount from the Fixed Rate Global plan when a customer agrees to a monthly minimum charge of $40.[27] Moreover, BSLD provides a further 10% discount on all three international calling plans for those customers who also subscribe to BellSouth's Complete Choice® calling plan or Area Plus® calling plan.

While BSLD may not lawfully offer its services below their incremental costs,[28] BSLD can price at levels that basically break even, while BellSouth's high margins on local service packages recover overhead costs and profits that BSLD's competitors must recover from their long distance rates. BellSouth's local exchange markets—while no longer *de jure* monopolies—are not sufficiently competitive to force down BellSouth's prices for its local services. High revenue contributions from local service packages sold by BellSouth in connection with BSLD's long distance services could also be used to subsidize[29] BSLD's very low toll rates.

---

[27] http://www.bellsouth.com/http://www.douglasbruce.com/ Click on "international plans." (visited June 24, 2003).

[28] *Implementation of the Non-Accounting Safeguards of Section 271 and 272* of *the Communications Act of 1934, as amended,* First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, at ¶258 (1996) ("*Non-Accounting Safeguards Order*") (subsequent history omitted).

[29] As with many economic terms, "subsidy" or "cross-subsidy" is not subject to precise definition. However, from a public policy perspective, "cross-subsidization occurs in a regulated industry when the regulated firm uses revenues from one market to keep operations in another market financially viable." MARK A. JAMISON, REGULATORY TECHNIQUES FOR ADDRESSING INTERCONNECTION, ACCESS, AND CROSS-SUBSIDY IN TELECOMMUNICATIONS, at 9 (nd) (unpublished) available from the University of Florida, at http://bear.cba.ufl.edu/centers/purc/primary/jamison/Pricing.pdf (visited June 9, 2003). Similarly, from a cost allocation view, "[i]n more general usage, if a service's prices do not make a reasonable contribution to overhead costs, it could be argued that the service is not carrying a fair share of the overheads and is therefore being subsidized." *Id.*, at 10. A more modern view is that "cross-subsidization occurs when prices for a service are higher than would be charged by the next most efficient competitor and the company still earns a normal profit." *Id.* Each of these definitions of a "cross-subsidy" is consistent with BellSouth and BSLD's actions in Florida.

Continued on following page

It has been long known within the telecommunications industry that local carriers have priced vertical features, such as Call Waiting, Call Forwarding, and Caller ID, well above their costs, generally to keep rates for basic local service low. For example, the FCC has stated that: "[R]ates charged for vertical services such as touch tone, conference calling and speed dialing subsidize basic local service rates."[30] The economic costs for these vertical services are generally only pennies per month, but retail customers pay charges of several dollars per month, per feature. Hence, these services are very profitable to BellSouth. While BellSouth could use these high profits to help keep local service rates low, BellSouth could also use these same profits from vertical services for less savory purposes—market domination—a position with which all of the BOCs are quite familiar and comfortable. In a market where a BOC is price regulated, these contributions from vertical services can also be used to enable the BOC's affiliate to enter the interLATA market with very low toll rates, which, in turn, could harm fair competition.

BSLD conditions its best long distance prices on the purchase of high-profit local service packages from BellSouth, which permits the combined corporate entity to be able to afford to price long distance services at very low levels to obtain market share, while retaining relatively high levels of total revenues for the BellSouth family of companies as a whole. (Other competitors, even if they also offer service bundles, simply do not have the deep pockets of the

---

Continued from previous page

The so-called "Baumol-Faulhaber" view of cross subsidization that would find that any product that covers its incremental costs, is not being cross subsidized, is becoming antiquated. *Id.* (Citing William J. Baumol, *Minimum and Maximum Pricing Principles for Residual Regulation*, 5 EASTERN ECONOMIC JOURNAL 235 (1979); and Gerald R Faulhaber, *Cross-subsidization in Public Enterprises*, 65 AMERICAN ECONOMIC REVIEW 966 (1979).

30 *Federal-State Joint Board on Universal Service*, Report & Order, 12 FCC Rcd 8776, at ¶11 (1997).

BOCs.) This pricing phenomenon can occur even when both carriers are complying with all cost allocation rules because BSLD's rates are not regulated and, while BellSouth's rates (both interstate access charges and local services) are price regulated by the FCC and the Florida Public Service Commission ("FPSC") respectively, price regulation simply does not guarantee that a BOC's prices have any relationship whatsoever to the underlying costs.

BellSouth has great pricing flexibility for its non-basic local services in Florida. Section 364.051(6)(a) of the Florida Statutes permits a price-regulated carrier, including BellSouth, to increase prices for non-basic local services by six-to-twenty percent over a twelve-month period. Moreover, as BellSouth would likely concede, the starting prices for these non-basic, vertical services greatly exceed their costs. Every vertical feature or large package of local services sold by BellSouth creates a large source of revenues that can pay expenses generated by other services or common overhead costs.[31] While these contributions have traditionally been used to avoid price increases for basic local service, they can also be used to subsidize a BOC's entry into long distance services.

A large holding company, such as BellSouth Corporation ("BSC"), must obtain sufficient revenues and earnings to meet the demands of its shareowners and the stock market

[31] The lack of real competition in the local exchange market can be demonstrated by the fact that BellSouth charges $5.50 per month for Call Waiting service in Miami, Florida (*See* http://cpr.bellsouth.com/pdf/fl/a013.pdf, at §A13.9.3.A.1.(c) (visited June 24, 2003), while its wireless affiliate, Cingular Wireless, includes Call Waiting service in its lowest-price calling plan ($19.99) for Miami customers at no additional charge. (*See* http://onlinestore.cingular.com/webapp/wcs/stores/servlet/ES_PROD_RATE?storeAlias=sfabmi&storeId=13051&catalogId=13051&langId=-1&svcAreaId=MIC&ratePlanType=Local (visited June 24, 2003). *See also,* BellSouth's 2002 Annual Report 10-K to the Securities and Exchange Commission ("SEC") ("Increasing competition could cause us to reduce our prices, restructure bundled service packages to provide more services without increasing prices, and increase our advertising and promotional spending.") *See* http://www.sec.gov/Archives/edgar/data/732713/000104746903007358/a2104641z10-k.htm (visited June 24, 2003).

generally. However, since BSC's shareholders cannot purchase ownership interests in individual subsidiaries, such as BellSouth or BSLD, the investors' financial demands must be met by the combined performance of all of BSC's subsidiaries. So long as the holding company's revenues and profits are acceptable, most shareowners are likely indifferent as to which subsidiary generates the financial results. In other words, a BSC shareowner could care less as to whether her dividends are generated from BSLD or BellSouth's profits.[32] This factor helps afford BSC and its subsidiaries the opportunity to cross-subsidize each other in the market.

Even if both BellSouth and BSLD were to be found in full compliance with any applicable cost allocation rules adopted by the FCC and the FPSC, BSC could still decide that it would accept a lower level of revenues and profits from BSLD as it entered the long distance market and attempted to establish market share so long as BellSouth's revenues and profits could be maintained or even increased due to a cleverly crafted, joint marketing strategy. Since regulation controls only BellSouth's prices, its revenues and profits can rise without regard to its costs if the BOC can execute its strategies correctly. For example, BellSouth can increase its revenues substantially when it sells either its Choice® calling plan or Area Plus® calling plan to customers who also want very low prices for international calls from BSLD. Those additional revenues in excess of what would have been earned if BellSouth had only sold $11 per-month basic services to BSLD's long distance customers could be used by BellSouth to pay dividends

---

32 BellSouth touts its revenue growth from its bundled packages in its 2002 10-K report. "Revenues from optional calling features such as caller ID, call waiting, call return and voicemail service increased $79 [million], or 3.5%, during 2002 and $136 [million], or 6.3%, during 2001. These increases were driven by growth in calling feature usage through our Complete Choice® Package, a one-price bundled offering of over 20 calling features. With 5.7 million packages, Complete Choice® has penetrated 34.4% of residential access lines. During 2002, we introduced BellSouth Answers, a package that combines the Complete Choice calling plan with Cingular Wireless service, Internet services and BellSouth Long Distance. We ended the year with 1.2

Continued on following page

to BSC that are more than sufficient to make up for any revenues and earnings forgone by BSLD's offering of bargain-basement toll rates to retail customers.

However, to the extent that this behavior is occurring in the market, it simply does not constitute the fair competition that is contemplated by the Act. It is highly unlikely that Congress expected that a BOC would be facing so little effective competition six years after passage of the Telecommunications Act that it can still avoid the need to "restructure [its] bundled service packages to provide more services without increasing prices," as BellSouth boasted in its 2002 Form 10-K report.[33] Rather, Congress expected that competition would drive down prices for local service as it has for wireless services.

Long distance carriers that are not affiliated with the BOCs cannot receive subsidies that can enable them to offer long distance services at or below cost. An independent long distance company must charge rates that recover all of its direct costs and overhead or face financial chaos. On the other hand, the combination of the BOCs' price cap regulation, which does not tie prices to costs or limit a BOC's ability to earn profits, with the BOCs' entry into long distance services has created a substantial loophole in FCC regulation that could enable the BOCs to manipulate the market and harm competition. A BOC can comply with the cost allocation rules and still, effectively, engage in anti-competitive cross-subsidies by operating with its affiliate as described herein.

Continued from previous page

million Answers packages in service." *Id.*, at 29.

33 *See* n.31, *supra*.

III. Market Power Analysis

The Commission seeks comments on the "extent of market power that could be exercised by a BOC or independent LEC affiliate providing in-region, interstate and international interexchange telecommunications services as an integrated corporate entity."[34] The FCC proposes to test BOC market power by measuring its (and/or its affiliate's) ability to "unilaterally raise and sustain prices of in-region, interstate and international interexchange telecommunications services above competitive levels in a particular relevant geographic market."[35] Americatel submits that the Commission should focus on the BOCs' power in the local market and their desire to extend that power to the interexchange market.

A. The BOCs' Bundling and Pricing of Services Demonstrates the Continued Market Power of the BOCs

The BOCs' decision to have their long distance affiliates offer low-ball prices, especially in the international market, has been made possible by the lack of effective competition in the local exchange market that permits them to maintain high margins on local services. Unless the Commission is willing to confront this issue or permit state public utility commissions ("PUCs") to do so, we will see less competition in the market over time, rather than more, as the BOCs remain dominant and *a la carte* competition falls by the wayside.

Bundling of telecommunications services and products can be in the public interest. A carrier may be able to assemble a combination of services and products that meets customers' needs and desires at prices that are lower than the customers would pay if they were to purchase those services and products separately.

---

34 *Further Notice*, at 22 (footnotes omitted).

35 *Id.*

However, unless the market is fully competitive, such that BOC market share has fallen to a shadow of its prior self, the bundling of services and products by the BOCs can effectively result in consumers purchasing larger quantities of goods and services than they may truly want or spending substantially more than they would prefer to pay, rather than reaping the fruits of competition, which are lower prices for more and better services. A good example of bundling in less than competitive markets is cable television, where many consumers object to the bundling of many channels together when they would rather be able to select only those channels likely to be viewed on a regular basis. Another criticism of bundling recently made by Queens College (N.Y.) Professor of Economics David Gabel is that, in order to avoid price competition in service packages, carriers tend to assemble bundles of services that cannot be easily compared to those from other carriers.[36] While this practice may well be lawful, it is hardly the type of bundling seen in the more competitive wireless industry.

Professor Gabel explains, "Bundles are priced according to their perceived value to the customer, not on the cost of providing service." For example, Gabel noted that "Call Waiting and Call Forwarding cost a fraction of a penny per month to provide. But phone companies charge several dollars each for those services."[37] One would presume that, if BellSouth (or any other large LEC for that matter) truly faced strong competition in their local service market, it would be lowering prices for basic service or offering added features at no extra charge. Professor Gabel contrasted the BOCs' bundling with that of wireless carriers, where the latter tend to offer their customers whose service contracts are ready to expire a new

---

36 *New Mantra in Telecommunications Industry*, ATLANTA J.-CONST., VIA NEWSEDGE, April 12, 2003, republished at http://www.computeruser.com/news/03/04/12/news3.html (visited May 27, 2003).

37 *Id.*.

bundle of additional minutes at no extra charge in exchange for the customers' contract renewal.[38] The plain truth is that the BOCs' local service markets simply are not competitive despite all of their rhetoric and hyperbole to the contrary.

It would be folly for the FCC to give the BOCs the same marketing freedom possessed by wireless carriers, including the ability to provide long distance services on a deregulated and integrated basis, unless and until the BOCs face the same consumer-driven market pressures as the wireless carriers. When the BOCs' market shares are no greater than those of wireless carriers and the BOCs' pricing policies resemble those of the wireless carriers (*i.e.*, prices are regularly reduced in both nominal and real terms), then and only then should the FCC consider granting regulatory relaxation to the BOCs.

B. The BOCs Unlawfully Prohibit Resale of Their Lowest-Price Long Distance Services

Another example of the BOCs' ongoing anti-competitive conduct relates to their general refusal to permit customers to resell their lowest-price long distance services in violation of long-standing FCC policy. For example, SBC Long Distance Services, Inc.'s ("SBC-LD") terms and conditions for interexchange, interstate, and international long distance service contains the following language in Section 2.29: "Prohibition of Resale - Except as explicitly authorized in a written agreement, the Service provided hereunder shall not be resold or provided to third parties." BSLD arrives at the same result by conditioning its lowest-price international calling plan on a customer's concomitant purchase of a large bundle of BellSouth's intrastate services. Thus, unless a competitor is willing also to resell BellSouth's local services (*i.e.*, become a competitive local exchange carrier ("CLEC")), it cannot resell BSLD's services.

---

[38] *Id.*

These anti-competitive actions on the part of the BOCs fly in the face of more than 25 years of FCC precedent requiring that all interstate services be subject to resale. In 1976, the FCC declared[39] that carriers' restrictions against the resale of their services were unjust and unreasonable under Section 201(b) of the Act and unduly discriminatory under Section 202(a) of the Act. The FCC reasoned that, by requiring carriers to permit others to share and resell services, the Commission would have an effective check on unreasonable retail pricing practices by carriers. Under this pro-resale policy, carriers would be unable to design a low-ball calling plan for their large-volume customers without the risk that another carrier would purchase the bargain high-volume calling package for resale to smaller-volume customers.

As competition spread through the long distance market during the 1980s, AT&T, then a dominant long distance carrier, sought permission from the FCC to offer interstate calling packages at prices that met those of its competitors. AT&T offered its customers so-called "contract tariff" services that were priced in a unique manner to meet both the needs of large-volume customers and the service offerings of competing carriers. While the FCC granted AT&T some general flexibility to address the demands of the market, the Commission did not, however, give AT&T *carte blanche* pricing freedom. Rather, the FCC applied its resale and sharing requirements to AT&T's contract tariff offerings.[40] These precedents are still applicable to every carrier, including SBC-LD, BSLD and the rest of the BOCs.

---

39 *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities,* Report & Order, 60 FCC 2d 261 (1976), *recon.,* 62 FCC 2d 588 (1977), *aff'd sub non., AT&T v. FCC,* 572 F.2d 17 (2d Cir.), *cert. denied,* 439 *U.S.* 875 (1978). Later, this policy was effectively extended to international services as well. *See generally, Regulation of International Accounting Rates,* First Report & Order, 7 FCC Rcd 559, at ¶5, n.8 (1991).

40 *See AT&T Communications, Revisions to Tariff F.C.C. No. 12*, Memorandum Opinion & Order, 4 FCC Rcd 4932*, recon. denied*, 4 FCC Rcd 7928 (1989), *rev'd on other grounds sub non., MCI*

Continued on following page

The Commission has not excepted the BOCs from compliance with this rule in order to give them a leg up in the long distance market. Yet the BOCs seem more than willing to flout the FCC's resale requirement in order to gain long distance market share by offering low-ball long distance prices without permitting resale. This unfair market situation does not need further rulemaking by the Commission. Rather, the Enforcement Bureau needs only to enforce existing FCC policies by directing show cause orders to each BOC and its long distance affiliate that prohibits resale of any interstate or international service.

IV. Unfettering the BOCs Now Will Likely Result in a Less Competitive Market

A. *The BOCs' History is Rooted in Anti-Competitive Conduct Such that the Commission Should be Reluctant to Permit the BOCs to Return to Their Past Stranglehold on the Market*

"Those who cannot remember the past are condemned to repeat it."[41] These words of the Spanish-American philosopher and poet George Santayana should be recalled by the Commission now as it considers how the BOCs should be permitted to offer end-to-end services. The BOCs (and for many years, their parent corporation, AT&T,) have a long and checkered history of using the bundling process to frustrate competition. Moreover, there is no good reason for the FCC to assume that the BOCs would not attempt to use bundling again to the same end. Unless the FCC takes some action that restrains the ability of the BOCs to leverage their near-monopoly power over the local exchange to acquire long distance market share, the U.S. telecommunications industry is likely to become an oligopoly at best.

Continued from previous page

Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990).

41 GEORGE SANTAYANA, LIFE OF REASON, REASON IN COMMON SENSE, 284 (Scribners 1905).

B. BOC History—Repeated Attempts to Frustrate Competition Through Bundling Products and Services and by the Arbitrary Pricing of Services without Regard to Costs

While bundled services packages can be found in competitive markets, a hallmark of a monopolistic market is the offering of bundled services for a single price, a strategy against which it is difficult at best to compete. A systematic review of the Commission's decisions affecting the Bell System yields a very strong theme underlying those decisions – carriers with significant power in the market should not be permitted to bundle their services into single-price packages, but must, rather, be required to offer customers choices. So long as the FCC has existed, it has faced BOCs with an overwhelming desire to create, sustain and extend a monopoly over as many services as possible. The Commission must keep this history of anti-competitive behavior in mind as it decides this proceeding. To do otherwise, is likely to enable history to repeat itself with the re-monopolization of the entire interexchange market by the BOCs.

1. The BOCs Systematically Resisted Competition in Terminal Equipment

For many years, LECs bundled terminal equipment as a part of telephone service and resisted attempts to open terminal equipment to competition and strongly resisted any attempts to allow customers to provide their own terminal equipment. For example, the BOCs took the position before the FCC, in the 1940s, that telephone customers would not be permitted to use a recording device in connection with their telephone service because those devices were considered "foreign attachments" (*i.e.,* a product related to telephone service but not provided by the BOC).[42] The FCC, however, rejected the BOCs' attempt to prevent their customers from

---

42 *Use of Recording Devices in Connection with Telephone Service*, Report, 11 FCC 1033, 1040-42 (1947). It must be noted, however, that the BOCs had already installed two recording devices for

Continued on following page

using recording devices with telephone service so long as all parties to the conversation to be recorded were given adequate notice thereof.

Nevertheless, the BOCs' resistance to competition in the terminal equipment market continued. In December 1948, Harry C. Tuttle, President of Hush-A-Phone Corporation, was forced to file a complaint with the FCC against the Bell System because AT&T and BOCs would not permit their customers to use the Hush-A-Phone device with their telephone service. The Hush-A-Phone was an acoustical device that was physically attached to the speaker side of a telephone handset and that permitted a person to whisper into a telephone handset, but to be easily heard by the person on the other end of the telephone line. Almost precisely seven years after filing his complaint, Mr. Tuttle prevailed when the FCC declared the Bell System's restriction against consumer use of the Hush-A-Phone unlawful.[43]

After losing the Hush-A-Phone case, the BOCs continued to battle against use of non-BOC provided terminal equipment. The Bell System opposed the use of the Carterfone, which permitted users of mobile radio systems to interconnect their landline telephone with a radio system, to permit mobile and fixed users to communicate with each other. Ultimately, the Commission rejected the Bell System's position and declared that customers could lawfully connect non-BOC-provided terminal equipment to the network, so long as such equipment did not cause harm to the network.[44]

Continued from previous page

newspapers (*id*., at 1039), but opposed the use of those devices when obtained from any other source (*id.*, at 1041-41).

43 *Hush-A-Phone Corp. v. AT&T*, Decision, 20 FCC 391 (1955), *rev'd sub nom., Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

44 *Use of the Carterfone Device in Message Toll Service* and *Carter v. AT&T*, 13 FCC 2d 420 (1968).

The litany of resistance to competition continued with the BOCs' attempts to require non-BOC-provided terminal equipment to be connected to the network only through protective couplers. When the FCC's Part 68 terminal equipment registration program[45] was adopted (thus permitting consumers to connect registered terminal equipment to the network without incurring additional costs for protective couplers), the BOCs proffered the so-called "Primary Instrument Concept" to the FCC. Under that proposal, which was also rejected by the FCC, each telephone customer would have been required to obtain at least one telephone set from the local telephone company.[46]

It would not be a prudent use of resources for Americatel to detail herein the BOCs' anti-competitive conduct in the terminal equipment area. A reasonably short narrative thereof can be found in Judge Harold Greene's September 11, 1981 Opinion rejecting the Bell System's motion to dismiss the Federal Government's antitrust suit after the Department of Justice's case-in-chief was completed.[47]

2. The BOCs Systematically Resisted Interexchange Competition

As the FCC is also well aware, the BOCs' record at excluding interexchange competition is equally gruesome. Judge Harold H. Greene succinctly summarized this history in his September 11, 1981 opinion. His recitation includes evidence that, during the 1940s to the

---

45 *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, First Report and Order, 56 FCC 2d 593 (1975), *on reconsideration,* 57 FCC 2d 1216 (1976), 58 FCC 716 (1976) and 59 FCC 2d 83 (1976); *Second Report and Order in Docket No. 19528*, 58 FCC 2d 736 (1976), *on reconsideration,* 61 FCC 2d 396 (1976) and 64 FCC 2d 1058 (1977); *aff'd sub nom., North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied* 434 U.S. 874 (1978).

46 *Implications of the Telephone Industry's Primary Instrument Concept*, Report, 68 FCC 2d 1157 (1978).

47 *U.S. v. AT&T Co.,* 1981-2 Trade Cases ¶64,277, at 74,228-231 (D.D.C. 1981).

1960s, the BOCs attempted to stave off competition in interexchange services by manipulating their interstate tariffs to compel "all video transmissions to be made through AT&T facilities, to prevent interconnection of private microwave systems to the public switched network, and to terminate the liberalized interconnections traditionally afforded to the private networks of right-of-way companies."[48] Judge Greene's order contains numerous other examples of the Bell System's attempts to thwart interexchange competition. It would behoove the Commission to revisit Judge Greene's pre-divestiture order in which he refused to dismiss the federal government's case against the Bell System.

3. The BOCs Systematically Engaged in Arbitrary Pricing of Services to Protect Their Market Position

Similarly, Judge Greene's September 11, 1981 Opinion also briefly summarizes the BOCs' history of pricing services "without regard to the cost of [those] services."[49] For example, prior to the FCC's decisions to permit private microwave system competition to the Bell System's private line services, those latter services were priced on a linear basis. However, once even an elementary form of private line competition arose, the Bell System immediately shifted its prices to volume discounts for very high-end users by introducing the Telpak service.[50] The Commission found that the Telpak rates were not cost-based and were unduly

---

48 *U.S. v. AT&T Co., id.*, at 74,232. This opinion continues to list other anti-competitive actions on the part of the BOCs to prevent customers from obtaining any part of their interexchange communications needs from any other sources. *Id.*, at 74,232-241.

49 *Id.*, at 74,241.

50 *See American Tel. and Tel. Co. Tariff F.C.C. No. 250, TELPAK*, Tentative Decision, 38 F.C.C. 370, Final Decision, 37 F.C.C. 1111 (1964); *Telpak Tariff Sharing Provisions of American Tel. and Tel. Co. and the Western Union Tel. Co.*, Decision, 23 F.C.C.2d 606, 613 (1970), *aff'd in part and rev'd in part sub non., AT&T Co. v. FCC*, 449 F.2d 439 (2nd Cir. 1971); *American Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 260 and 267 concerning Resale and Shared Use, Transmittal No. 12715*, Memorandum Opinion and Order, 64 F.C.C.2d 1003, 1004 (1997*), aff'd in part and*

Continued on following page

discriminatory. Moreover, the FCC rejected the Bell System's argument that these discriminatory rates were justified by application of the competitive necessity doctrine.

The FCC expressed deep concerns over the potential anti-competitive effects of bundling in its *Second Computer Inquiry Order*.[51] For example, while discussing the then-extant practice of bundling terminal equipment into network services, "bundling introduces complexities that make it more difficult for regulators to achieve a rate structure for regulated services that is sufficiently aligned with cost differences among services to avoid discrimination among users of different services."[52]

There is no need to burden the Commission with more of the countless examples of the BOCs' arbitrary pricing history. What is more important is that the BOCs are using their new interLATA market entry authority and ability to bundle services in a manner that would repeat history.

C. The BOCs' Recent Record is also Tainted with Anti-competitive Behavior

The BOCs would likely argue at this time that the anti-competitive behavior of the Bell System is but old history. However, a quick scan of the Enforcement Bureau's recent activities rebuts this view. The FCC has found numerous instances of anti-competitive conduct on the part of the BOCs. For example, on June 7, 2003, the Commission announced that it was

---

Continued from previous page

rev'd in part sub non., Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

51 *Amendment of Part 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1977), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff d sub nom., Computer and Communications Indus. Ass'n v. FCC*, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, 56 Rad. Reg. 2d (P&F) 301 (1984).

52 *Id.*, at ¶155.

fining Qwest $6.5 million under a consent decree for Qwest's admitted violations of Section 271 of the Act's ban on the provision of in-region long distance services.[53] Several days earlier, the FCC granted a complaint against Verizon for violating its interconnection requirements.[54] SBC lost a formal complaint in April of this year, with the Commission finding that SBC violated the terms of the order approving its acquisition of Ameritech.[55]

Qwest's unlawful sale of long distance services was not unique. Verizon was recently fined $5.7 million for marketing long distance services within its region, but without first gaining FCC approval.[56] In 2002, SBC paid the federal treasury the sums of $3.6 million and $6 million for more violations of applicable rules.[57] The Commission must consider both the history of the BOCs resisting competition and the current laundry list of anti-competitive behavior by the BOCs in creating rules that will protect fair competition.

---

[53] *Qwest Admits Violations of Long Distance Ban – Company to Make $6.5 Million Payment to United States Treasury*, News Release, FCC 03-107 (rel. May 7, 2003).

[54] *FCC Finds that Verizon Violated Interconnection Requirements*, News Release, FCC 03-96 (rel. April 23, 2003).

[55] *FCC Grants Formal Complaint; Finds SBC in Violation of the SBC/Ameritech Merger Order*, News Release, FCC 03-03 (rel. April 17, 2003).

[56] *Verizon Admits Violations of Long Distance Marketing Ban – Company to Make $5.7 Million Payment to the United States Treasury*, News Release, FCC 03-41 (rel. March 4, 2003).

[57] *FCC, SBC Communications, Inc. Agree to Consent Decree – SBC to Make $3.6 Million Payment to United States Treasury,* News Release, FCC 02-153 (rel. May 28, 2002) (resolving two FCC investigations concerning inaccurate information provided by SBC to the Commission in connection with SBC's applications to provide long distance services in Missouri, Kansas and Oklahoma); *FCC Fines SBC Communications, Inc. $6 Million for Violations of Commission Merger Condition*, News Release, FCC 02-282 (rel. Oct. 9, 2002).

V. The BOCs' Continued Local Service Market Power Necessitates the Continued Imposition of Competitive Safeguards

A. The BOCs Must Continue to be Classified as "Dominant Carriers"

The FCC seeks comments as to "whether, and to what extent, dominant carrier regulation of interstate and international interexchange services is suited to achieving the Commission's objectives to promote competition and to deter anticompetitive behavior by BOCs following a section 272 sunset."[58] Continued classification and regulation of the BOCs as dominant carriers in any market where they offer long distance services on an integrated basis is crucial for competition to exist. Indeed, the public interest would be even better served were the FCC to extend the currently applicable three-year requirement for the BOCs to provide long distance services solely through a separate affiliate until such time as the BOCs can no longer control their local service markets.[59]

As Americatel has demonstrated earlier and the Commission is already well aware, the BOCs have a long history of using service bundling and non-cost-based pricing to harm competition. More important, the BOCs' offering of non-cost-based bundles of services, which are laced with "cross-subsidies," as they reenter the long distance market provides strong,

---

58 *Further Notice*, at ¶38.

59 In light of the BOCs' ability to use their interexchange affiliates to manipulate the market by forgoing long distance service profits when customers also purchase highly profitable bundles of other services from the BOC, the FCC should consider imposing a requirement that each BOC long distance subsidiary have at least a minority of non-BOC stock ownership with appropriate voting authority to prevent domination by the BOC. Such a requirement would impose fiduciary duties upon the BOC and its affiliate in favor of the minority shareowners and would likely prevent the BOC from manipulating the affiliate for its own anti-competitive purposes. For example, were such a requirement in place, BSLD would not be providing "low-ball" long distance rates for only those customers who also purchased a large bundle of BellSouth's services. Rather, BSLD would be required to price its services so as to optimize returns for its shareowners. *See, infra*, at 35 *et seq.*

if not compelling, evidence that the BOCs plan to behave in a similar manner today. The question, however, is: Will the FCC facilitate the BOCs' ill behavior?

At a bare minimum, the FCC should continue to require that BOCs that provide long distance services on an integrated basis file tariffs and cost support for their rates for those services. This result would require the BOCs to set their rates in some relationship to the costs for services and would permit the BOCs' competitors to protest the BOCs' rates on the grounds that such rates are anti-competitive or otherwise unjust and unreasonable.[60]

However, the mere requirement for the BOCs to file cost support for their interstate and international long distance services is insufficient to protect the market against unfair competition by the BOCs. As discussed above, the current system for rate regulation of the BOCs as dominant carriers is price regulation, rather than cost-of-service regulation. Operation of price cap regulation in a market that is only semi-competitive permits the BOCs to earn economic rents on price cap-regulated services that can be used to offer anti-competitive rates for long distance services in those circumstances where the availability of the lowest long distance rates are tied to the purchase of the high-margin local services or where the long distance rates are not subject to resale.

There are but two courses of action for the FCC to take to prevent further anti-competitive action by the BOCs when they offer integrated long distance services. One possible tack would be for the FCC to condition a BOC's provision of integrated long distance services on the re-targeting of such BOC's federal and state price cap indices to cost. Such a result would, in the instance of BellSouth in Florida, reduce substantially the prices that BellSouth

---

60 *See* 47 C.F.R. §1.773.

could charge for its Complete Choice® calling plan, which, in turn, would force it either to abandon its "low-ball" rates for long distance services or accept a substantially lower overall level of profits.

The other alternative would be for the FCC to condition a BOC's provision of integrated long distance services on the use of rate-of-return regulation based on a fully distributed cost allocation plan for all BOC services—state or interstate (including international services)—that could be bundled together by the BOC.[61] Under this regulatory scheme, BellSouth would be required to earn the same rate of return for its Complete Choice® calling plan as it did for international calls to Mexico.

B. Regulators Should Review Service Bundling by the BOCs

1. Australia's Regulation of Bundling by Telestra

On March 21, 2003, the Australian Competition and Consumer Commission ("ACCC") adopted new rules that require Telestra, the incumbent carrier, to "record information and provide the ACCC with quarterly reports in relation to Telestra's bundled service products."[62] The ACCC adopted its new rules in order for the Australian Commission to have the information necessary for it to determine the impact of Telestra's bundling on competition and the ability of other providers to compete with Telestra. "Telstra must provide information on

---

61 *See generally, American Telephone & Telegraph Company, Long Lines Department, Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK)*, Memorandum Opinion & Order, 61 FCC 2d 587 (1976). The FCC imposed a cost allocation system on AT&T that required the Bell System to maintain the same relationship between revenues and costs, or the same rate of return, for each class of services provided.

62 *ACCC Issues Record Keeping Rule to Telstra for Bundling*, Media Release, (ACCC, March 21, 2003) ("*Bundling Release*") http://www.accc.gov.au/media/mediar.htm (visited May 28, 2003). The ACCC's new bundling rules (Bundled Service Record Keeping and Reporting Rules, §151BU, Part XIB, Trade Practices Act, 1974 (Austl.) are available at http://www.accc.gov.au/telco/fs-telecom.htm (visited May 28, 2003). A copy of these rules is attached hereto as Exhibit "A."

matters such as the discounts given on a bundle of services, the number of customers receiving bundled services and whether customers currently receiving a bundle of services previously received individual services from Telstra or another provider," according to the ACCC's March 21 Media Release. The ACCC took this action even though it clearly recognized that, at least in the short run, "bundling of telecommunication services can lead to increased efficiencies and provide many consumer benefits, such as lower prices and single bills."

2. The FCC Should Adopt Reporting Rules for the BOCs' Bundling of Services

Americatel submits that the new Australian rules strike a fair balance between the need to permit incumbent carriers to respond to market conditions by offering packages of services and the need mandated by statute to protect competition by preventing the incumbents from returning to near monopoly-like conditions by using bundling to drive out *a al carte* competition for individual services. The same approach should be taken in the United States.

However, unlike Australia and most other nations, the United States does not have a single regulatory agency that is responsible for the telecommunications industry. The FCC shares this responsibility with the various state PUCs. Thus, for any reasonable regulatory oversight of service bundling by the BOCs, both the FCC and PUCs must become involved. The first step that should be taken by the FCC is to adopt similar bundling reporting rules for the BOCs that the ACCC adopted for Telstra. The BOCs' reports on bundling should be made both to the FCC and the appropriate PUC.

Next, the FCC should specifically state that PUCs are authorized to investigate *any* bundled service package offered by a BOC to residential customers, much as it has authorized the PUCs to handle slamming complaints. A PUC should be able to regulate the terms and conditions under which a service bundle can be offered by a BOC and to prohibit a BOC from offering service packages unless regulatory conditions are met – even when those packages include interstate or international services. For example, a PUC should be permitted to prohibit a BOC from selling a bundle of services including flat-rated interstate long distance calls and discounted international calls, for example, if a customer is required to purchase features, such as Caller ID, Call Waiting, Call Forwarding, Call Return and Three-Way Calling, as a part of the package.[63] Similarly, a PUC should be permitted to prohibit a BOC from bundling services together unless each component of the service package can be individually resold.

C. The Commission Should Consider Imposing Further Restrictions on the BOCs as Has Occurred in Chile with Considerable Success in Increasing Competition

Chile, where Americatel's parent company ENTEL Chile is based, has achieved substantially more local competition than in the United States. Data from Subtel (Subsecretaría de Telecommunicaciones de Chile), Chile's telecommunications regulatory agency shows that the market share of Telefónica CTC Chile's ("CTC"), the incumbent local exchange carrier whose largest shareowner is Telefónica de España ("Telefónica"), has fallen to 78% as of 2002. CTC has entered the long distance market, but has not been able to dominate it due to Subtel's regulatory policies that limit CTC's ability to leverage its control over local network facilities to gain an unfair advantage in the long distance market.

In addition, pro-competitive regulation in Chile in the long distance market had reduced ENTEL Chile's formerly monopoly share of the long distance market to well below 40% for both domestic and international services. This competitive pressure, in turn, has created

---

[63] A PUC should not, however, be permitted to regulate the price of the interstate or international calls. For example, a PUC should be prohibited from conditioning a BOC's ability to offer a package of services, including international toll calls, on the BOC's pricing of international toll calls at minimum rates of $0.15 per minute.

strong incentives for ENTEL Chile to improve its network and offer new and creative services and pricing. As a result thereof, ENTEL Chile's market share has again risen above 40%.

Chile has developed a regulatory framework that is designed to ensure that CTC cannot dominate the long distance market while its local market becomes more competitive.. For example, Chile's basic telecommunications laws require the incumbent to perform billing and collection services for its competitors.[64] In order to prevent CTC from having financial advantages over competitors, including long distance carriers, CTC is also required to disconnect all service if a customer fails to pay for long distance calls carried by a competing carrier, but billed by CTC.[65] Furthermore, CTC is required to provide each customer with a single bill that contains services provided by all carriers,[66] which, of course, requires CTC to provide billing and collection services to long distance carriers.[67] Title III, Article 24 also requires CTC to provide to long distance carriers all information that is material to a customer's subscription to and use of long distance services. For example, CTC must provide long distance carriers information that includes the customer's name, address, telephone number, account status (*i.e.,* whether the customer has any unpaid bills), and usage information (*i.e.,* monthly minutes of long distance use on both an incoming and outgoing basis, separated by domestic and international calls).[68] CTC is also required to provide or update most of this customer information on a monthly basis.[69]

---

64 LEY GENERAL DE TELECOMMUNICACIONES DE CHILE, tit. III, art. 24.

65 *Id.*, at Ch. III, art, 45.

66 *Id.,* at Ch. VII, art. 43.

67 *Id.*, at Ch. VII, art. 42.

68 *Id,* at tit. II, art. 47. Americatel realizes, of course, that some of this information would be considered

Continued on following page

Many parties in Chile believe that one of the main reasons that the local exchange market in Chile is becoming more competitive and that CTC has not been able to transfer its local market dominance to the long distance market is the Chile's imposition of more regulatory duties on CTC than the FCC places on the BOCs and the other large ILECs. While there are, of course, additional costs associated with Chile's higher level of regulation over CTC, the resulting benefits of more vigorous competition in Chile might well outweigh those costs, such that, in the overall, Chilean consumers are better off than their counterparts in the United States.

D. Alternatively, the Commission Could Simply Allow the BOCs to Choose to Provide Long Distance Services Through a Separate Affiliate that is not Wholly Owned by the BOC

A simpler solution that might require less day-to-day oversight of the BOCs and their long distance affiliates by the FCC would be to permit the BOCs to elect to continue to provide long distance services through an affiliate, but to require that the affiliate have some independent shareowners. The simple creation of independent shareowners for a BOC's long distance subsidiary would also create a fiduciary duty running from the BOC to its affiliate's no-BOC shareowners. The BOC could not simply manipulate the long distance affiliate to protect the BOC's local market share or revenues. Rather, the BOC would be required to make business decisions that optimized revenues and profits for the benefit of the minority shareowners.

The BOCs are likely to respond that such a requirement would hobble their marketing efforts. Such a statement would be false and easily contradicted. The BOCs—save

---

Continued from previous page

in the United States to constitute Customer Proprietary Network Information ("CPNI"), under Section 222 of the Act, 47 U.S.C. §222, and could not be distributed to other carriers without first obtaining the customer's permission.

69 LEY GENERAL DE TELECOMMUNICACIONES DE CHILE, tit. II, art. 48.

Qwest Communications, which is only a very minor operator in wireless services—each are affiliated with a wireless carrier that is not wholly owned by the BOC. SBC and BellSouth are partners in Cingular Wireless and Verizon Wireless is a joint venture between Verizon and Vodafone. These affiliated companies regularly work together and even offer bundles of services. The major difference between the two situations—local and wireless and local and long distance—is that Verizon, for example, cannot force Verizon Wireless to price its services solely to protect Verizon's local market position. Verizon must and, indeed, likely does respect the interests of Vodafone's shareowners in Verizon's dealings with Verizon Wireless. There is no good reason why the FCC cannot apply this simple safeguard to the long distance market. Such a result would be much simpler for all than many other alternatives.

In light of decades of anti-competitive conduct by the BOCs, the FCC clearly has the authority to direct the BOCs to continue to provide long distance services only through a separate affiliate and to require those affiliates to have some reasonable amount of non-BOC ownership. Section 272(f)(1) specifically authorizes the Commission, by order or by rule, to extend the three-year sunset provision for the offering of BOC long distance services only through a separate affiliate. Given the BOCs' track record of flouting FCC requirements designed to promote a fair and competitive market, the FCC would be more than justified in adopting a rule that would extend the separate affiliate requirement indefinitely until the BOCs can demonstrate several years' history of full compliance with all regulatory requirements.

The FCC also has the authority to order the BOCs to divest a portion of their ownership in their long distance affiliates, even though such an order would not be necessary under Americatel's proposal that would merely give the BOCs an option of creating minority ownership in their long distance affiliate as a less-burdensome form of regulation than that which may be necessary to ensure that real competition exists in every market. The FCC has held that, based on ample court precedent, it has the authority to order a complete divestiture of a portion of a carrier's operations.[70] Therefore, it seems clear that, to the extent the FCC would even have the authority to *order* a BOC to divest its entire ownership in a long distance affiliate, the Commission could direct a partial diminution of a BOC's ownership in its long distance affiliate, especially given that the only other reasonable alternative would be for the imposition of more stringent dominant carrier regulation on the BOCs.

Given the BOCs' propensity to ignore the FCC's rules of fair competition that have been discussed herein, it may well be necessary for a BOC's affiliate to have a majority of its shareowners independent from the BOC or, if not a majority of independent shareowners, to impose appropriate voting controls so that the minority stockowners have sufficient power to prevent the affiliate from being a mere tool of the BOC. The BOCs' post-1996 behavior has tended to be so anti-competitive that the mere existence of a fiduciary duty from the BOC to its affiliate's shareowners is not likely to be sufficient to protect the affiliate's independence.

VI. CONCLUSION

For the reasons set forth herein, the FCC should continue to regulate the BOCs as dominant carriers in the event that the Commission were to permit the BOCs to provide long distance services on an integrated basis; require the BOCs to retarget all of their rates to cost and

---

70 *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion & Order, 12 FCC Rcd 19985, at ¶30, n.57 (1997), *citing, inter alia, Pan American World Airways, inc. v. United States*, 371 U.S. 296, 321-13 & n.17 (1963) ("Authority to mold administrative relief is indeed like the authority of courts to frame injunctive decrees subject of course to judicial review. … The power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority.")

to impose additional regulatory requirements on the BOCs before permitting them to offer long distance services on an integrated basis. Alternatively, the Commission could simply permit the BOCs to continue to offer long distance services through a separate affiliate without any other new regulations provided that such affiliate had some reasonable level of independent ownership.

Respectfully submitted,
AMERICATEL CORPORATION

By:____________________________

Judith L. Harris
Robert H. Jackson
Reed Smith LLP
1301 K Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
202.414.9200
202.414.9299 (fax)
Its Attorneys

Dated: June 30, 2003

CERTIFICATE OF SERVICE

I, Lila A. Myers, do hereby certify that the foregoing **COMMENTS OF AMERICATEL CORPORATION** was served on this 30th day of June, 2003 upon the following in the fashion indicated:

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

William Maher, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Jeffrey Carlisle, Senior Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Carol Mattey, Deputy Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Michelle M. Carey, Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Gregory M. Cooke, Deputy Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Janis Myles
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554 *Via E-mail*

Qualex International,
Portals II
445 12th Street, SW, CY-B402
Washington, D.C. 20554 *Via E-mail*

____
Lila A. Myers